

#### Members

Sen. Vi Simpson, Chairperson  
Sen. Kent Adams  
Sen. Glenn Howard  
Rep. David Wolkins  
Michael Frey  
Patrick Bennet  
Greg Quartucci  
Randy Edgemon  
Vince Griffin  
Michael Sandefur  
Dan Willard  
David Hatchett  
Larry Smith  
Tim Method  
Travis Worl  
Bill Beranek  
Bill Hayden  
Michael Carnahan  
Cliff Duggan  
Tim Maloney  
Michael Brown  
David Lamm  
Rae Schnapp  
Tanya Galbraith  
Alice Schloss



## **WETLANDS SUBCOMMITTEE OF THE ENVIRONMENTAL QUALITY SERVICE COUNCIL**

*Legislative Services Agency*  
**200 West Washington Street, Suite 301**  
**Indianapolis, Indiana 46204-2789**  
**Tel: (317) 232-9588 Fax: (317) 232-2554**

#### LSA Staff:

Bernadette Bartlett, Fiscal Analyst for the Council  
Robert Bond, Attorney for the Council  
Timothy Tyler, Attorney for the Council

Authority: P.L. 248-1996 (SEA 138)

### **MEETING MINUTES<sup>1</sup>**

**Meeting Date:** September 6, 2000  
**Meeting Time:** 1:30 P.M.  
**Meeting Place:** State House, 200 W. Washington  
St., House Chambers  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 2

**Members Present:** Sen. Vi Simpson, Chairperson; Rep. David Wolkins; Alice Schloss.

**Members Absent:** Sen. Kent Adams; Sen. Glenn Howard; Randy Edgemon; Michael Carnahan.

Senator Vi Simpson, Chair of the Wetlands Subcommittee, called the meeting to order. Senator Simpson introduced Dr. Dennis Clark of the Indiana Department of Environmental Management (IDEM). Dr. Clark presented an overview of the proposed rules on Wetland Water Quality Standards of the Water Pollution Control Board. Dr. Clark provided an outline of his comments (See Exhibit 1) and a copy of the proposed rules (See Exhibit 2),

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<sup>1</sup> Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

which includes a Report to the Water Pollution Control Board from the Office of Water Management of IDEM. Dr. Clark described the general structure of the proposed rules, and emphasized the tiered structure for classification of wetlands. Generally, wetlands are considered to be Tier 1 unless they fall within Tier 2 criteria concerning: (1) the presence of threatened or endangered species; or (2) conformance with definitions in the proposed rules of certain types of wetlands characterized by specific features. Although the term "Tier 3" is not specified in the proposed rules, Dr. Clark indicated that wetlands that may be considered for designation as outstanding national resource waters as described in Section 7 of the proposed rules are considered to comprise Tier 3. Dr. Clark described the antidegradation requirements and the criteria for protection of water quality and hydrological conditions that apply to wetlands.

Dr. Clark described possible changes to the proposed rules. Efforts will be made to clarify some of the definitions. Consideration is being given to deletion of language in Section 5 of the proposed rules that permits the commissioner of IDEM to require that compensatory mitigation be completed and approved prior to any impact to a Tier 1 wetland. Also under consideration is amendment of the language in Section 4 of the proposed rules so that Tier 2 designation does not result from the presence in the wetland of threatened or endangered species. Dr. Clark indicated that the language of these proposed amendments has not yet been finalized. When the language becomes available, it will be shared with the subcommittee.

Sen. Simpson then asked if there were questions for Dr. Clark. George Scholka, Save the Dunes, expressed concern about the proposed amendment concerning threatened and endangered species based on the view that the presence of such species is necessarily an indication that the wetland system is not functioning properly. Dr. Clark responded that the intent of the proposed amendment was not to eliminate consideration of the presence of threatened or endangered species, but to make the determination of the significance of the presence of such species on a case by case basis.

Doug Bley, Bethlehem Steel, asked if, with the proposed amendment concerning threatened and endangered species, those criteria for designation of Tier 2 wetlands would be replaced with other criteria. Dr. Clark responded that only the remaining criteria concerning certain types of wetlands would result in a Tier 2 classification.

Vince Griffin, Indiana State Chamber of Commerce, asked whether the duty to protect waters under Section 401 of the Clean Water Act means that all wetlands must meet state water quality standards, or that all wetlands must be protected but not necessarily meet those standards. Dr. Clark responded that, as is the case with water quality standards for surface waters, state water quality standards apply to all wetlands.

John Humes, Hoosier Energy, asked if the failure of a wetland to meet state water quality standards would result in the wetland being deemed an impacted water to be listed on the Total Maximum Daily Load list under Section 303(d) of the Clean Water Act. Dr. Clark responded that, if the wetland did go on the list, the cause of the impairment would first have to be ascertained to determine if anyone would be responsible for addressing it.

Patrick Bennett, Indiana Manufacturers Association, asked whether, under Section 6 of the proposed rule, all state water quality standards would apply to wetlands, or only those listed in the proposed rules. Dr. Clark responded that with respect to wetlands, not all of the surface water quality standards would apply. Some examples of exceptions are the pH and DO readings, where the normal values for wetlands might be different from the normal values for other surface waters.

Fred Andes, Barnes & Thornburg, asked which water quality standards, in addition to those applicable to *E. coli*, apply to wetlands. Dr. Clark responded that the narrative form of minimum water quality standards applies, along with the standards set forth in the tables relating to toxic substances and those for ammonia and bacteria.

Tim Maloney, Hoosier Environmental Council, using the example of the presence of the river otter in a wetland, asked if the proposed threatened and endangered species amendment is made, what procedure would apply to protect that habitat. Dr. Clark responded that the presence of the threatened or endangered species would be taken into account in the procedure for determining whether to issue a water quality certification for impacts to the wetland or other waters.

Paul Johnson, Indianapolis Water Company, asked how the state would know whether there is an impact on a wetland if it doesn't fall within the current Section 401 and Section 404 regulatory scheme. Dr. Clark responded that although the surface water quality standards apply to all waters of the state, they are mainly implemented through the NPDES program. Similarly, although the wetland water quality standards would apply to all wetlands, they would be implemented mainly through the Section 401 Water Quality Certification program.

Bill Hayden, Sierra Club, asked whether IDEM is required to protect endangered species under the federal Endangered Species Act, and whether there could be a situation in which Tier 2 designation might not apply even though an endangered species is present. Dr. Clark responded that theoretically, there could be a situation where a proposed activity would impact some portion of a wetland but not adversely affect an endangered species. He emphasized his view that threatened and endangered species could be protected on a case by case basis. Bill Hayden asked if it were proposed to run a pipe through a wetland to discharge into a river in which endangered mussels are located, what kind of protection would be afforded to the endangered species. Dr. Clark responded that the appropriate means of addressing potential impact from the discharge from the pipe would be through the NPDES application process.

Mike Brown, American Electric Power, asked whether data are available to evaluate the extent to which high levels of *E. coli* in wetlands might be naturally occurring through the presence of waterfowl and other wildlife, and whether it might be appropriate to not take such natural occurrence as a violation of water quality standards. Dr. Clark responded that he does not have such data. He suggested that: (1) site-specific criteria could be developed for that particular wetland; or (2) the designated use might not be appropriate, and a Use Attainability Analysis might be completed to determine whether there is some other more appropriate use. Andrew Pelloso, IDEM, indicated that EPA has advised IDEM that *E. coli* standards must be a part of water quality standards that apply to wetlands in Indiana (although these standards might apply in other ways in other states, such as Ohio). He also indicated that if wetlands may not support full body contact because of *E. coli* levels, a Use Attainability Analysis might be needed. Dr. Clark stated that the *E. coli* criterion is there to protect human health and not to protect the conditions in the wetland, as are many of the other criteria.

Jim Davis, Waste Management, commented about his concern that in some cases mitigation projects attract waterfowl and other wildlife, resulting in high *E. coli* levels. Although the mitigation plan is successful as evidenced by the attraction of wildlife, the resultant increased *E. coli* levels run afoul of water quality standards. Dr. Clark responded that mitigation is not judged by *E. coli* numbers, but by the success of the mitigation project in replacing the function of the wetland.

George Scholka, Save the Dunes, stated that not all forms of E. coli are harmful to humans, and asked whether this factor is taken into account. Dr. Clark responded that the presence of E. coli generally is taken as an indicator of the presence of bacteria and viruses that are potentially harmful to humans. Andrew Pelloso indicated that based on EPA guidance considering that some non-human origin E. coli can be detrimental to humans, no differentiation is made based on the source of the E. coli.

Senator Simpson asked when E. coli standards apply, and whose responsibility it would be to address the E. coli levels. Matt Rueff, IDEM, responded that IDEM would have to determine if the E. coli levels were naturally occurring. It is IDEM's responsibility under the Clean Water Act to provide and enforce E.coli standards for protection of human health.

Dr. Dan Willard commented that the waters in many wetlands, because of conditions such as low oxygen or high acidity, are not suitable for humans, and that it is not appropriate to apply general water quality standards to systems that are inherently not suitable for humans.

Patrick Bennett, Indiana Manufacturers Association, suggested that separate water quality standards should be set for wetlands to avoid the dilemma that successful mitigation might result in the violation of general water quality standards concerning E. coli. Andrew Pelloso responded that all waters must meet the full body contact standard because humans come in contact with wetlands in the same way that they come in contact with other waters.

Senator Simpson asked whether general water quality standards apply to wetlands constructed for the purpose of water treatment. Andrew Pelloso responded that such wetlands are exempt from the wetland water quality standards.

Senator Simpson asked whether EPA requires that water quality standards address E. coli, or that a specific E. coli standard must apply. Andrew Pelloso responded that EPA requires that water quality standards must be protective of human health.

Fred Andes, Barnes & Thornburg, suggested that to the extent that EPA is advising that Indiana water quality standards must be written in a certain way, the subcommittee should call on EPA to attend a subcommittee meeting and explain its positions, including why certain standards apply in other states but not in Indiana.

Jim Davis, Waste Management, commented that the full body contact standard should not apply to a wetland if evaluation of the wetland reveals that, by its natural characteristics, it is not suitable for full body contact. He also commented that property owners are put in a difficult position to have to prove that E. coli is naturally occurring.

Dr. Dan Willard commented that it would be useful to set up a series of reference wetlands to establish a reference point for identifying successful mitigation.

Fred Andes, Barnes & Thornburg, commented that it is important to the regulated community that the right designated uses and water quality standards be created, and that appropriate differences be recognized between the uses and standards applicable to wetlands, and those applicable to surface waters. He also expressed concerns about the meaning of the "social and economic" test, particularly how those terms will be interpreted and applied, and how property owners will meet the test.

Patrick Bennett, Indiana Manufacturers Association reviewed the comments that the IMA made in the rulemaking process, and asked IDEM to provide an updated version incorporating all currently contemplated amendments.

Tim Maloney, Hoosier Environmental Council, objected to the proposed amendment concerning threatened and endangered species, which would remove the presumption for Tier 2 designation and reduce the standard simply to consideration of the existence of such species by IDEM. He noted his view that the amendment is not needed in part because the trigger under Section 4 of the proposed rules is not automatic, but also includes the factor determined by the Indiana Department of Natural Resources whether the wetland contains suitable habitat for such species.

Dr. Dan Willard commented that there is a great variety of wetlands, and that a system of categorization such as the tiered system is needed. Certain wetlands that remain in their natural state should be preserved. In order to apply the regulations on wetlands, a complete inventory of wetlands is needed, along with more complete information on the nature of wetlands.

Bill Hayden, Sierra Club, commented in objection to any changes to the current E. coli standards, and to the proposed amendment to remove the threatened and endangered species trigger for Tier 2 designation.

John Humes, Hoosier Energy, commented that greater evaluation of the antidegradation features of the proposed rules is needed, particularly with respect to potential impact on farming activities.

George Scholka, Save the Dunes, commented that considering that approximately 85% of wetlands in the state have been destroyed, it is necessary to have very good justification to destroy any more wetlands. Because wetlands systems are poorly understood, destruction of wetlands could have unknown and unintended consequences. Without a system for an inventory of wetlands, we do not fully understand the consequences of destruction of wetlands. He also expressed his objection to the proposed amendment to remove the threatened and endangered species trigger for Tier 2 designation.

Bill Beranek expressed his concern that the different interested parties at today's meeting are using different assumptions, and are not understanding the reasonable positions of the others. Such understanding is necessary to accomplish the core task of meshing an Indiana land use policy with a surface water quality policy. The characteristics of wetlands vary greatly. It is necessary first to build more specifics into the Indiana wetland conservation plan, establishing a state policy on desirable wetland land use in the context of acceptable agriculture, urban, and "development" policy. It will then be easier to craft the appropriate wetland water quality standard to which landowners will be held accountable.

Mike Brown, American Electric Power, commented in support of the proposed amendment concerning threatened and endangered species. He stated his view that using the presence of such species as a "default" decision criterion for designating a Tier 2 wetland is unnecessary because protection is already adequately afforded by state and federal regulations. He also gave an example of such protection that occurred upon the discovery of an endangered plant species at the AEP Rockport Plant. Mr. Brown also supported the proposal to invite EPA to a subcommittee meeting.

Senator Simpson announced that because of conflicts with other meetings, the meeting of the Wetlands Subcommittee scheduled for September 13 has been canceled. Mitigation, which was to be the topic for the September 13 meeting, will be the topic for the September 28 meeting. Another meeting will be scheduled to consider the topic of Economic Impact and Benefits of Wetlands.

Participants were asked to submit any prepared comments. The meeting was then adjourned.